

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DAVID ALLARD,

Appellant,

v.

DEPARTMENT OF FISH AND WILDLIFE,

Respondent.

) Case No. DSEP-02-0006

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held at the office of the Personnel Appeals Board, in Olympia, Washington, on August 14, 2003. WALTER T. HUBBARD, CHAIR, reviewed the file and record and participated in the decision in this matter. BUSSE NUTLEY, MEMBER, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant David Allard was present and represented himself *pro se*. Morgan Damerow, Assistant Attorney General, represented Respondent Department of Fish and Wildlife.

1.3 **Nature of Appeal.** This is an appeal from a disability separation.

II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent Department of Fish and Wildlife. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on June 24, 2002.

2.2 Appellant was a Fish Hatchery Specialist 2 with the Department of Fish and Wildlife. Appellant began working for the Department of Fish and Wildlife on September 19, 1983.

2.3 Appellant's position was classified as one requiring heavy physical demands. The essential functions were identified as:

- Standing
Standing is frequent and varied dependent upon task. Standing can vary from two to seven hours per day.
- Walking
Walking is frequent and varied from day to day. The worker may walk up to one mile, six to eight times per day, to feed and inspect the fish in various ponds.
- Lifting
The worker will lift 50-pound bags of feed frequently, sometimes into a blower feeder at chest level. Adult salmon can weigh up to 40 pounds and are handled several times a week in the fall. Lifting can occur from below the knee to waist or shoulder level.
- Carrying
50-pound bags of fish food are carried between 10 and 15 feet at times. The worker will also carry between 12 to 25 pounds of fish food in a five-gallon bucket to the fishponds. The worker will carry up to 25 pounds, six to eight times per day, up to 10 miles daily.
- Pushing/Pulling
The worker may push a 2,500 pound loaded bin on a hand pallet jack which requires up to 100 pounds of force.
- Stooping/Bending at Waist
The worker bends forward from the waist more than 90 degrees to handle, feed, and inoculate fish. The worker also handles the trays which contain the eggs. The worker must

1 stoop from ground level to 16" above eye level to handle these trays and the adjoining
2 machine.

3 • Possible Job Modifications

4 The employer offers no modifications.

5 2.4 Appellant first injured his lower back in October 1985 when he was lifting large fish. He
6 suffered several subsequent lower back injuries. Most of Appellant's subsequent lower back
7 injuries occurred while on the job; however, he had been able to tolerate his work as a hatchery
8 specialist for many years. On November 19, 1993, Appellant underwent laminotomy and
9 diskectomy surgery.

10
11 2.5 On October 22, 2001, Appellant strained his lower spine while lifting fish with a dip net.
12 Appellant has not returned to work since October 22, 2001.

13
14 2.6 On October 23, 2001, Appellant's physician, Stanley Garlick, M.D, examined and
15 diagnosed Appellant with lumbar strain with a restricted and painful range of motion. Dr. Garlick
16 indicated that Appellant's recovery could be prevented or retarded because he had a history of
17 degenerative disk disease.

18
19 2.7 On November 27, 2001, Dr. Garlick reported that Appellant was experiencing pain and
20 numbness in his left leg. Appellant also had decreased sensation in his left leg and complete
21 absence of left ankle jerk and right knee jerk responses. Appellant remained sedentary at home,
22 received massage therapy and acupuncture, and began walking one-half hour per day for exercise.

23
24 2.8 On December 29, 2001, Appellant began receiving chiropractic treatment twice per week
25 from Brian Mittelstaedt, D.C.

1 2.9 On January 18, 2002, Dr. Garlick reported that Appellant was overall in less pain and could
2 walk without difficulty but was uncomfortable when sitting. According to Dr. Garlick, Appellant's
3 condition had been fixed and stable for the past three to six months. Appellant was not able to lift
4 over 50 pounds and could lift 26 to 50 pounds only occasionally.

5
6 2.10 The agency arranged an independent medial examination for Appellant. On February 9,
7 2002, R. Milton Schayes, M.D., Orthopedist; Robert Price, M.D., Neurologist; and Geoffrey Masci,
8 D.C., Chiropractor, examined Appellant. All three doctors concluded that Appellant was unable to
9 perform the essential functions of his position without modifications because he could not lift or
10 carry in excess of 25 pounds and needed to avoid truncal bending and twisting as much as possible.
11 Dr. Schayes and Dr. Price reported that further treatment measures were not likely to provide any
12 curative benefit. Dr. Masci concluded that continuing chiropractic treatment would correct
13 Appellant's condition with a full recovery to pre-injury status and he would likely be able to return
14 to work. However, Dr. Schayes and Dr. Price disagreed with Dr. Masci and reported that the result
15 would more than likely result in temporary relief.

16
17 2.11 Katherine Waldrop, Safety Officer 2, reviewed the results of the independent medical
18 examinations. Appellant's job could not be modified to comply with the permanent work
19 restrictions that were identified by the doctors. Therefore, Ms. Waldrop concluded that it was not
20 possible for Appellant to return to his position as a Fish Hatchery Specialist 2.

21
22 2.12 By letter dated April 15, 2002, Sandra Turner, Workforce Diversity Manager, informed
23 Appellant that he might be eligible for the agency's Reasonable Accommodation Program since he
24 was no longer able to perform the essential functions of his position. Ms. Turner provided
25 Appellant with a Reasonable Accommodation Request form and the Reduction-in-Force Transition
26 Pool Application form.

1 2.13 The Department of Fish and Wildlife was not able to provide Appellant with permanent
2 light duty positions. As part of the Return to Work and Reasonable Accommodations policies, Ms.
3 Waldrop explored other employment possibilities for Appellant within his physical limitations.
4 However, options for other positions within the department were limited due to a state hiring freeze
5 that was in effect, Appellant's limited transferable skills, his restriction to performing sedentary to
6 light jobs, and his unwillingness to relocate.

7
8 2.14 Ms. Waldrop located a vacant Scientific Technician 2 position with duties that may have
9 been within Appellant's restrictions. By letter dated May 21, 2002, Ms. Waldrop provided Dr.
10 Garlick with a job analysis of the Scientific Technician 2 position and asked him to assess
11 Appellant's ability to perform the job.

12
13 2.15 Appellant and his doctor discussed the vacant Scientific Technician 2 position and decided
14 that due to Appellant's condition, the duties were not within his physical abilities. Therefore,
15 Appellant declined the position.

16
17 2.16 By letter dated May 24, 2002, Lew Atkins, Assistant Director, notified Appellant of his
18 disability separation from his Fish Hatchery Specialist 2 position effective July 26, 2002.

19
20 2.17 In the spring of 2003, approximately one year since being separated, Appellant began
21 treatment at the Virginia Mason Clinic in the pain rehabilitation program. By letter dated May 30,
22 2003, Thomas Williamson-Kirland, M.D. reported that Appellant was fully rehabilitated and was
23 released to return to his job of injury.

24
25 2.18 After being rehabilitated and released to work by his physician, Appellant was placed on the
26 Reduction-In-Force register.

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III. ARGUMENTS OF THE PARTIES

3 3.1 Respondent argues that Appellant could not perform the essential functions of his position at
4 the time he was separated because he was restricted to lifting 25 pounds with minimal twisting and
5 bending. Respondent asserts that the Fish Hatchery Specialist position is a very physical job and
6 requires the ability to lift up to 50 pounds. Respondent contends that Appellant's job could not be
7 modified to accommodate his physical restrictions and light duty could not be provided on a
8 permanent basis. Respondent argues that Appellant is currently on the Reduction-In-Force register
9 and will be re-hired as soon as the hiring freeze is lifted and a position becomes available.
10 Respondent asserts that a disability separation was the only recourse based on the medical
11 information available at the time the separation was initiated.

12

13 3.2 Appellant argues that he is now fully recovered and able to return to his job of injury.
14 Appellant asserts that the department did not provide adequate time to allow him to rehabilitate
15 before separating him. Appellant contends that Dr. Masci's conclusion was ignored when he
16 reported that chiropractic treatment would correct his condition and would likely result in a full
17 recovery and allow him to return to his job of injury. Appellant argues that being on the Reduction-
18 In-Force register does not guarantee him a job. Appellant asks the Board to affirm his appeal and
19 reinstate him to his Fish Hatchery Specialist position.

20

21

IV. CONCLUSIONS OF LAW

22 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
23 herein.

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25 4.2 At a hearing on appeal of a disability separation, the appointing authority has the burden of
26 supporting the action that was initiated. WAC 358-30-170. Respondent has the burden of proving

1 that Appellant was unable to perform the duties of the position as specified in the letter of
2 separation and that reasonable accommodation cannot be provided. Smith v. Employment Security
3 Dept., PAB No. S92-002 (1992).

4
5 4.3 The issue here is whether Respondent complied with the provisions of WAC 356-35-010
6 when it separated Appellant from his position as a Fish Hatchery Specialist 2 due to his disability.
7 WAC 356-05-120 defines a disability as “[a]n employee’s physical and/or mental inability to
8 perform adequately the essential duties of the job class.” In this case, Appellant was unable to
9 perform the lifting, bending, and twisting essential duties required of his position. Therefore,
10 Appellant’s condition at the time of the separation met the definition of a disability.

11
12 4.4 We considered Appellant’s argument that the department did not provide adequate time for
13 rehabilitation prior to separating him, and he is now fully recovered. However, Appellant was not
14 fully released to return to work until May 2003, which was approximately 19 months from his date
15 of injury and close to one year after his separation due to disability. WAC 356-35-010 does not
16 require an employer to wait an indefinite period of time once it is known that the employee cannot
17 perform the essential functions of the job.

18
19 4.5 WAC 356-35-010(1) provides, in part, that an appointing authority “may initiate a disability
20 separation of a permanent employee only when reasonable accommodations cannot be provided. . .”
21 Respondent had no obligation to reallocate or alter the essential functions of Appellant’s position.
22 Therefore, Respondent reasonably concluded that accommodation could not be provided to allow
23 Appellant to perform the essential duties of his position.

1 4.6 Finally, as a part of its accommodation process, Respondent conducted vacancy searches for
2 positions that might have met Appellant's physical restrictions. We conclude, therefore, that
3 Respondent made good faith efforts to accommodate Appellant.
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5 4.7 Respondent has met its burden of proof that Appellant could not perform the essential duties
6 of his position and that reasonable accommodation could not be provided. Therefore, the disability
7 separation of David Allard should be affirmed and his appeal denied.
8

9
10 **V. ORDER**

11 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of David Allard is denied.
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13 DATED this _____ day of _____, 2003.
14

15 WASHINGTON STATE PERSONNEL APPEALS BOARD
16

17 _____
18 Walter T. Hubbard, Chair
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20 _____
21 Gerald L. Morgen, Vice Chair
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